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Supreme Court of the United States

OCTOBER TERM, 1965

No. 557

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Petitioner,

—against—

N.V. NEDERL. AMERIK STOOMV. MAATS,

Respondent.

MOTION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING AND SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Respondent.

MOTION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING

Petitioner respectfully moves for leave to file the annexed Second Petition for Rehearing of the order of this Court denying the petition for writ of *certiorari* in this case, entered on December 13, 1965, on which order rehearing was denied on January 31, 1966. Rehearing is sought at this time on the sole ground that, as is set forth in the annexed petition, a petition for writ of *certiorari* to the Court of Appeals for the Fifth Circuit in the case of *Waterman Steamship Corporation* v. *Atlantic & Gulf Stevedores, Inc.*, 353 F. 2d 660 (1965), was docketed with this Court on April 26, 1966 (No. 1255 of the October Term, 1965) and that case presents for review matters identical to those here presented.

The major issues presented for review in *Waterman* are what constitutes "indemnity precluding conduct" under this Court's opinion in *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.*, 355 U. S. 563, and whether

such determination is one of fact for a jury or of law for a Court. The resolution of these issues by the Fifth Circuit in *Waterman* is directly contrary to the resolution of similar issues by the Second Circuit in the instant case. Indeed, one of the grounds urged by petitioner in the *Waterman* case is that very conflict between the Fifth Circuit and the Second Circuit.

As the instant case presents the same issues that are involved in the *Waterman* case, your petitioner respectfully prays that a writ of *certiorari* issue in this case as well as in the *Waterman* case in order that a definitive ruling ending the conflict between the various Circuits might be had.

Although mindful of Rule 58 proscribing the filing of consecutive petitions for rehearing, petitioner invokes the power of this Court to rescind the denial of *certiorari* under the authority of *Bowden* v. *Fort Smith,* 316 U. S. 584, 589 (1942), and *Helvering* v. *Southwest Consolidated Corporation,* 316 U. S. 710 (1941).

Supreme Court of the United States

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No. 557

INTERNATIONAL TERMINAL OPERATING CO., INC.,

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—against—

N.V. NEDERL. AMERIK STOOMV. MAATS,

Respondent.

SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of December 13, 1965, denying the petition for writ of *certiorari*, and the subsequent denial of rehearing entered January 31, 1966, and that a writ of *certiorari* issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case, as prayed for in the petition filed on or about September 9, 1965, and the petition for rehearing filed on or about January 4, 1966.

Reasons for Granting Rehearing and Issuing the Writ

The petition for rehearing herein was denied on January 31, 1966. On April 26, 1966, a petition for a writ of *certiorari* to the Court of Appeals for the Fifth Circuit in the case of *Waterman Steamship Corporation* v. *Atlantic & Gulf Stevedores, Inc.*, 353 F. 2d 660 (1965), was

filed with this Court. As stated in the opening sentence of the opinion of the Fifth Circuit in *Waterman*:

> "This appeal turns on the *Weyerhaeuser* corollary to the *Ryan* doctrine of stevedore-shipowner indemnity."

The petition for a writ of *certiorari* filed in *Waterman* presents for review the question of what constitutes "indemnity precluding conduct" on the part of a shipowner, and whether such determination is one of fact for the jury or of law for the Court. Such petition in *Waterman* urges the conflict between the Fifth Circuit and the Second Circuit and cites the opinion of the Second Circuit in the instant case no less than four times as evidence of such a conflict. That such conflict exists is beyond dispute as the action of the Second Circuit in reversing a jury verdict for the stevedore in the instant case was diametrically opposed to the action of the Fifth Circuit in affirming a jury verdict for the stevedore in the *Waterman* case.

There was, concededly, proof in the instant case that (1) the stevedore complained to a ship's officer as soon as the dangerous condition was known or should reasonably have been known, *and* (2) the ship's officer directed the stevedore to continue working under the dangerous condition, *and* (3) the ship's officer assured the stevedore that he would promptly and entirely eliminate the dangerous condition, *and* (4) the stevedore complied with such direction and assurance. In its opinion in the instant case, 346 F. 2d 481, 484, the Second Circuit held that the foregoing was inadequate evidence of active "hindrance" which would constitute indemnity precluding conduct on the part of the shipowner.

The Fifth Circuit in *Waterman* and the Second Circuit in the instant case both dealt with jury verdicts in favor

of the stevedore on the issue of the shipowner's right to indemnity, and they reached contradictory results by reason of their conflicting opinions of the applicable law. In the event that this Court grants *certiorari* in the *Waterman* case, which is earnestly desired, it is respectfully urged that this case should be considered along with it by reason of its conflicting approach to a common issue to the end that the law may be clarified for the guidance of all Courts called upon to interpret and apply maritime law in the ever increasing number of cases between shipowner and stevedore.

CONCLUSION

For the reasons set forth above and in the petitions for writ of *certiorari* and rehearing, it is respectfully urged that a rehearing be granted and, upon such rehearing, a writ of *certiorari* issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

SIDNEY A. SCHWARTZ
Attorney for Petitioner

JOSEPH ARTHUR COHEN
Of Counsel

Certificate of Counsel

I hereby certify that the foregoing Second Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

SIDNEY A. SCHWARTZ
Attorney for Petitioner

END